No. 18243 ✓

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

J. R. SIMPLOT COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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JURISDICTION

This case is before the Court on the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*),[1] for enforcement of its order issued against respondent on August 17, 1962. The Board's decision and order (R. 80–89)[2] are reported at 138 NLRB No. 20. This Court has jurisdiction over this proceeding, the unfair labor practice having occurred at Heyburn, Idaho, where respondent operates a

[1] The pertinent statutory provisions are reprinted, *infra*, pp. 22–25.

[2] References to the pleadings, the decision and order of the Board, the stipulated record, and other papers, reproduced as Volume I, Pleadings," are designated "R."

starch plant, within this judicial circuit. No jurisdictional issue is presented (R. 81).

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that respondent violated Section 8(a)(5) and (1) of the Act by admittedly refusing to bargain collectively with the Union,[3] which had been certified by the Board as the bargaining representative of all production and maintenance employees in respondent's starch plant. The facts pertaining to the representation and unfair labor practice proceedings are as follows:

A. The representation proceeding

On April 25, 1960, the Union initiated a representation proceeding before the Board [4] by filing a petition for an election pursuant to Section 9(c)(1) of the Act (R. 10). On March 9, 1961, the Board issued an Amended Decision and Direction of Elections (R. 62–64), and the election was conducted pursuant thereto on March 22, 1961, in two separate voting groups (R. 81–82)[5]. The Union lost the election by a

[3] American Federation of Grain Millers, AFL–CIO, herein called the Union.

[4] An earlier petition was dismissed as not timely filed because respondent did not have a representative and substantial complement of employees in the proposed unit (R. 10).

[5] Group A, the unit with which the instant case is concerned, consisted of all production and maintenance employees at respondent's starch plant in Heyburn, Idaho, while Group B comprised employees at the processing plant, packing, sorting sheds, and other employees of the starch plant (R. 82).

vote of 3 to 7,[6] and thereafter filed timely objections to conduct affecting the results of the election (R. 22–23).[7] Following an investigation the Regional Director, on June 7, 1961, issued a report on objections in which he recommended that the election be set aside (R. 25–30).

The Regional Director found that respondent had admittedly effectuated a ten cent hourly wage increase for all employees in the voting units on February 20, 1961 (R. 26).[8] Secondly he found that respondent had, between February 15, 1961, and the date of the election, "* * * addressed hand bulletins, correspondence and questionnaires to its employees in which it pointed out (a) Employer's intent 'to give employees the same fair and equitable treatment insofar as job

[6] The Union also lost the election in Group B, receiving 216 votes, with 20 cast for the Teamsters and 336 against both organizations. The Teamsters received no votes from the employees in Group A (R. 82).

[7] As summarized by the Board, the four objections were that, prior to the election, respondent interfered with its employees by (1) granting wage increases, (2) promising the employees they would get anything the Union got the employees at the other, unionized, plants of the Company, (3) holding captive audience meetings on the day prior to the election, and (4) putting on "a terrific antiunion campaign for several days just prior to the election, with promises of things they would do for them if they voted 'no union'" (R. 82–83).

[8] On September 26, 1961, a trial examiner found, on charges filed by the Union on April 20, 1961, that respondent had violated Section 8(a) (2) and (1) of the Act by establishing and dominating a Workmen's Committee, but had not violated Section 8(a)(1) in effectuating the wage increase. The recommended order of the Trial Examiner became final under Section 10(c) of the Act, without Board consideration of the merits, since no exceptions were filed to the Intermediate Report (R. 12). See Argument, *infra*, pp. 14–15.

classifications, local conditions and type of operations permit' regardless of union affiliation, (b) specifically invited employees' attention to the identity between specific conditions of employment at the Heyburn Plant and those at plants covered by Petitioner's collective bargaining agreements[9] and (c) utilized a local newspaper to advertise increased benefits negotiated at Union plants of the Employer, announced that those benefits could not be put into effect at subject plant by reason of the impending NLRB election, and then, contrary to the announcement, it did make the same increases effective at Heyburn" (R. 27).

Based on his conclusions with respect to the first two objections, as well as objection 4,[10] the Regional Director recommended that the elections be set aside, and that new elections be conducted (R. 30).

In its exceptions to the Regional Director's report, respondent did not dispute the fact that it had granted the wage increase, but asserted that the company desired to maintain, if possible, a standard wage rate in

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[9] The Union had existing agreements in respect to employees at respondent's plants located in Shelley, Idaho and Caldwell, Idaho (R. 10–11, 22).

[10] The Regional Director rejected the third objection (captive audience meetings), and sustained the fourth objection (anti-union campaign) (R. 29, 82–83). In its Supplemental Decision, Order and Direction of Second Election the Board agreed with the findings of the Regional Director with respect to Objection 3, but expressly did not pass on Objection 4 and the question whether respondent's conduct considered as a whole created an atmosphere which rendered the expression of free choice impossible (R. 63).

all of its plants, and also desired to be competitive with wage rates established by other firms in the area. Respondent stated that since negotiations with the Union in its other two plants were reaching their conclusion, it decided to put into effect the same wage rates at Heyburn as were established at its other plants. Respondent also cited its concern with the Board's delay in ordering an election as a factor behind the February 20 wage increase (R. 31–32).

Respondent excepted to the Regional Director's conclusions on Objections 2, 3, and 4 "for the reason that such conclusions are not based upon the facts surrounding the conduct of the election, and further that the conclusions of the Regional Director are inferential by their own admission, and the statements therein contain so much sham, irrelevant, and redundant matter that they should be disregarded in their entirety by the Board." (R. 32).

On August 16, 1961, the Board issued a Supplemental Decision, Order and Direction of Second Election (R. 62–64). The Board, agreeing with the Regional Director's conclusions, found that the conduct with respect to Objections 1 and 2 "constituted promises of and granting of benefits which were calculated to interfere with the election and formed a basis for setting it aside." (R. 63). As noted, the Board did not pass upon the fourth objection.

The Union received a majority of the valid votes cast in Group A in the second election held October

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19, 1961,[11] and was certified as bargaining representative on October 27, 1961 (R. 84).

B. The unfair labor practice proceeding

On December 26, 1961, the Union requested respondent to meet with it for the purpose of negotiating an agreement covering the employees which it had been certified to represent. On January 4, 1962, respondent declined, and has since then continually refused to meet and bargain with the Union (R. 13).

Following unfair labor practice charges filed by the Union and the issuance of a complaint, the parties entered into a stipulation waiving a hearing and presenting the case to the Board for decision upon the stipulation and certain specified documents incorporated therein (R. 9). The Board, upon a consideration of the stipulated record and the briefs filed, issued its Decision and Order, rejecting respondent's defense that the Board had arbitrarily and capriciously set aside the first election without first ordering a hearing on the Regional Director's report on objections and respondent's exceptions to that report (R. 84).

II. The Board's conclusion and order

The Board concluded that respondent's refusal to bargain was violative of Section 8(a) (5) and (1) of the Act (R. 86). The Board ordered the Company to cease and desist from the unfair labor practice found upon request to bargain collectively with the Union, and to post the customary appropriate notice (R. 87).

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[11] The Union did not receive a majority in Voting Group 1 (R. 84).

ARGUMENT

The Board acted reasonably and within its permissible discretion in setting aside the first election and conducting a second election within a year, and therefore properly found that respondent violated Section 8 (a) (5) and (1) of the Act by refusing to bargain with the certified bargaining representative of its employees

The sole issue in this case is the propriety of the Board's action in setting aside the first election held on March 22, 1961. Respondent has attempted to justify its admitted refusal to bargain with the Union upon the ground that the Board arbitrarily and capriciously set aside the first election without first ordering a hearing on the Regional Director's report on objections and respondent's exceptions thereto. Presumably, respondent's claim is that the second election, upon which the certification of the Union is based, was held in disregard of Section 9(c)(3) of the Act which provides that "no election shall be directed in any bargaining unit or subdivision within which, in the preceding twelve-month period, a *valid* election shall have been held." [Emphasis supplied.] Section 9(c)(3) would be applicable only if the Board erred in its determination that the first election was *invalid*. For the reasons discussed below, we submit that the certification issued by the Board in the representation case was valid and proper in all respects, and hence conclusive on the issue of the Union's representative status. It follows, accordingly, that respondent's admitted refusal to bargain was violative of Section 8(a)(5) and (1) of the Act.

A. The decision to set aside an election is a matter resting within the discretion of the Board

The Supreme Court has made it clear that, "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *N.L.R.B.* v. *A. J. Tower Co.,* 329 U.S. 324, 330. Thus it is "* * * for the Board and not the courts to exercise the discretion as to * * * whether or not [an] election should be set aside for irregularities in procedure. For the courts to substitute their judgment for that of the Board in such matters would be for them to undertake an impossible task and entirely to misconceive their function under the statute." *N.L.R.B.* v. *National Plastic Products Co.,* 175 F. 2d 755, 758 (C.A. 4). This settled principle has been unequivocally endorsed by this Court. *Foreman & Clark, Inc.* v. *N.L.R.B.,* 215 F. 2d 396, cert. denied, 348 U.S. 887; *International Telephone & Telegraph Corp.* v. *N.L.R.B.,* 294 F. 2d 393, 395. Accord: *N.L.R.B.* v. *Waterman S. S. Corp.,* 309 U.S. 206, 226; *N.L.R.B.* v. *Huntsville Mfg. Co.,* 203 F. 2d 430, 434 (C.A. 5); *Olson Rug Co.* v. *N.L.R.B.,* 260 F. 2d 255, 256 (C.A. 7).

Consequently, the standard to be employed in a determination of the propriety of the Board's action in setting aside the first election is not whether the Board was "right" or "wrong" in its decision, but whether or not it acted arbitrarily and capriciously. The Third Circuit has cogently observed that "something more than error is necessary to spell out arbi-

trary or capricious action." *N.L.R.B.* v. *J. W. Rex Co.*, 243 F. 2d 356, 358. We submit, and shall demonstrate below, that the Board's action was not arbitrary or capricious but, to the contrary, was completely reasonable and proper.

B. The Board did not deprive respondent of any constitutional or statutory rights by not ordering a hearing on its exceptions to the Regional Director's report on objections

Respondent, in its argument before the Board in the unfair labor practice proceeding, contended that the Board's action in setting aside the election without first ordering a hearing deprived it of due process of law under the Fifth Amendment; respondent's premise was that the Board's findings in the representation proceeding were tantamount to finding it guilty of conduct which amounted to unfair labor practices with the sanction of setting aside the election.

It is readily apparent that respondent has misconceived the nature and purpose of the Board's representation proceedings. The entire proceeding leading to certification is investigatory in nature,[12] conducted so as to enable the Board to discharge its statutory duty; it is in no sense an adversary pro-

[12] Section 9(d), which provides for judicial review of certifications terms this proceeding an investigation. It provides: "Whenever an order of the Board made pursuant to Section 10(c) is based in whole or in part upon facts certified following an *investigation* pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such *investigation* shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) * * * " [Emphasis supplied.]

ceeding. "The preliminary investigation and the hearing in the representation proceeding are not contentious litigation; not even litigation, but investigation. It is made on behalf of the Board by members of its staff. The outcome is merely a certification of a bargaining representative." *N.L.R.B.* v. *Botany Worsted Mills*, 133 F. 2d 876, 882 (C.A. 3), cert. denied, 319 U.S. 751.

No complaint is issued in representation proceedings, and a Board order directing a new election contains no sanction against anyone. The employer's interest in representation proceedings under Section 9 of the Act is "very unsubstantial." *N.L.R.B.* v. *National Mineral Co.*, 134 F. 2d 424, 426 (C.A. 7), cert. den., 320 U.S. 753. As this Court aptly put it, "An employer has little if any voice or interest in the selection of his employees' bargaining unit." *Foreman & Clark, Inc.* v. *N.L.R.B.*, 215 F. 2d 396, 406, cert. den., 348 U.S. 887. Hence respondent's contention that the Board set aside the election as a sanction against the Company is patently without foundation. Respondent's bald assertion that the Board's findings in the representation proceeding were tantamount to finding it "guilty of unfair labor practices" is specious, and does not require extended discussion.[13] Simi-

[13] The Board properly pointed out that it in no way adjudicated that respondent had committed an unfair labor practice by setting aside the election on grounds which could, in an adjudicative proceeding, be a basis for an unfair labor practice finding (R. 85). Indeed, respondent's contention on this point is belied by the fact that, after an appropriate hearing on whether or not it had violated Section 8(a)(1) of the Act by granting the wage increase, a trial examiner concluded that respondent had not committed an unfair labor practice. See argument, *infra*, pp. 14–15.

larly, respondent's argument that the Board, in setting aside the election, deprived it of the right to express its views as permitted by Section 8(c) of the Act[14] and the First Amendment is without merit. "The Constitution protects procedural regularity, not as an end in itself, but as a means of defending substantive interests." *Fay* v. *Douds*, 172 F. 2d 720, 725 (C.A. 2).

Parties are entitled to a hearing as a matter of right in all unfair labor practice proceedings instituted under Section 8 of the Act. In representation proceedings, however, the only mandatory hearing is that which is held *prior* to the election, pursuant to Section 9(c)(1), to determine whether or not a question of representation exists.[15] Indeed, Section 5(6) of the Administrative Procedure Act expressly exempts the certification of employee representatives (Section 9(c) of the National Labor Relations Act) from its formal procedural requirements for a hearing.[16] "Nowhere in the Act is there a specific requirement that the Board conduct post-election hearings on objec-

[14] The short answer to this contention is that Section 8(c) applies only to evidence in unfair labor practice proceedings, not in representation proceedings under Section 9 of the Act. Section 8(c) provides: "The expressing of any views, argument, or opinion, or the dissemination thereof, * * * shall not constitute or be evidence of an *unfair labor practice* under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." (Emphasis supplied.) Clearly, respondent's freedom of speech was not impinged. *Foreman & Clark, Inc.*, v. *N.L.R.B.*, 215 F. 2d 396, 408–409 (C.A. 9), cert. den., 348 U.S. 887.

[15] This hearing was held in the instant case on June 1, 1960 (R. 10).

[16] 60 Stat. 239, 241; 5 U.S.C. 1001, 1004.

tions." *N.L.R.B.* v. *O.K. Van Storage, Inc.*, 297 F. 2d 74, 75 (C.A. 5).

Nevertheless, the Board's Rules and Regulations provide that it *may* order a hearing on exceptions to the report on objections if it appears to the Board that such exceptions raise substantial and material factual issues.[17] Even a cursory reading of the pertinent rule discloses that it does not grant a hearing on exceptions to the report on objections as a matter of right. It merely sets forth that the Board may, in its discretion, order a hearing if it believes such would prove fruitful in resolving substantial and material questions of fact.

The need for such summary procedure is obvious. "The opportunity for protracted delay of certification

[17] Section 102.69(d), Rules and Regulations and Statements of Procedure, Series 8, as Amended, 1959, was the applicable rule in force at the time respondent filed its exceptions to the Regional Director's report on objections. That Section provided: "If exceptions are filed * * * to the report on * * * objections * * * and it appears to the Board that such exceptions do not raise substantial and material factual issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record. * * * If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served upon the parties a notice of hearing on said exceptions before a hearing officer." Section 102.69 was amended, effective with respect to any petition filed under Section 9 (c) or (e) of the Act on or after May 15, 1961, so as to grant the Regional Director authority to decide the case. The quoted portion of Section 102.69(d) has been carried over intact to Section 102.69(e), Rules and Regulations and Statements of Procedure, Series 8, as amended, 1962; 29 C.F.R. Sec. 102.69(e) (1962).

of the results of representation elections which would exist in the absence of reasonable conditions to the allowance of a hearing on objections is apparent." *N.L.R.B.* v. *O.K. Van Storage, Inc.*, 297 F. 2d 74, 76 (C.A. 5). Consequently, the Board has uniformly declined to direct a hearing on objections unless the party supplies specific evidence of conduct which *prima facie* would warrant setting aside the election. This policy has received explicit judicial approval. *N.L.R.B.* v. *O.K. Van Storage, Inc., supra; N.L.R.B.* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 372 (C.A. 5), cert. den., 348 U.S. 873. Similarly, as the Board stated, "the party excepting to the 'Report on Objections' must supply specific evidence which *prima facie* would warrant the Board rejecting the Report." (R. 85).[18] This, however, respondent failed to do.

C. The Board's decision to set aside the election without first ordering a hearing was reasonable and proper

1. The reasons for not holding a hearing

Respondent, in its exceptions, did not raise any substantial and material factual issues which needed to be resolved by a hearing officer. In regard to the first objection, it did not deny the fact that it had effectuated the wage increase just prior to the election. Respondent merely asserted its reasons for granting the wage increase. A hearing on the first objection would have served no useful purpose, since

[18] See *Olson Rug Co.*, 120 NLRB 366, 369, n. 3; *International Shoe Co.*, 123 NLRB 682, 684. This is also the Board's policy regarding exceptions to the Regional Director's findings on challenged ballots. *Great Eastern Color Lithographic Corp.*, 131 NLRB, 1141, n. 4.

the Board was fully cognizant of respondent's argument as to why it had granted the increase. The Board duly considered respondent's argument before it concluded that the election should be set aside.

Respondent, in the 8(a)(5) proceeding endeavored to show that the Board's action was arbitrary and capricious because, subsequent to the Board's sustaining the two objections to the election, a trial examiner concluded that respondent had not violated Section 8(a)(1) of the Act by granting the wage increase, the gravamen of the first objection. The mere fact that a trial examiner concluded that the granting of the wage increase did not constitute an unfair labor practice does not demonstrate that the Board acted arbitrarily and capriciously in setting aside the election. As the Board pointed out, even assuming *arguendo* that the trial examiner considered the wage increase against the entire background of the conduct covered by the second objection, the Board is in no way bound by that finding, which was never appealed (R. 85, n. 9). Furthermore, the Board has long differentiated between conduct which interferes with an election and conduct which interferes with rights guaranteed in Section 7 of the Act. The Board explained in *Hicks-Hayward Co.*, 118 NLRB 695, n. 1:

> The Board has heretofore recognized a distinction between the two types of interference and has held that the criteria applied in a representation proceeding to determine whether certain alleged misconduct interfered with an election need not necessarily be identical to those employed in testing whether an unfair labor

> practice was committed. * * * We see no valid reason for departure from the precedent * * * and finding * * * that conduct which interferes with a free election necessarily constitutes a violation of Section 8(a)(1) of the Act.

There are numerous cases wherein the Board has set aside elections because of conduct which would not constitute an unfair labor practice.[19]

Respondent, in its exceptions, made no attempt to controvert the remaining objections. Its flat assertion that the Regional Director's conclusions "are not based upon the facts surrounding the conduct of the election, * * * are inferential by their own admission, and * * * contain so much sham, irrelevant, and redundant matter that they should be disregarded in their entirety by the Board" (R. 32), certainly does not raise substantial and material factual issues, and does not meet the Board's *prima facie* test.

In sum, respondent's exceptions did not raise substantial and material factual issues, as required by the Board's Rules and Regulations, so as to warrant a hearing, nor did respondent present specific evidence which *prima facie* would warrant rejection of the Regional Director's report, as the Board has consistently required in past cases. Hence respondent was not entitled to a hearing on its exceptions. This Court observed in *Foreman & Clark, Inc.* v. *N.L.R.B.*, 115 F. 2d 396, 407, cert. den., 348 U.S. 887, that "there

[19] E.g., *General Shoe Corp.*, 77 NLRB 124, 126; *Am-O-Krome Co.*, 92 NLRB 893; *Belk's Department Store*, 98 NLRB 280; *Qualiton*, 115 NLRB 65, 66–67; *General Cable Corp.*, 117 NLRB 573, 574.

is 'great latitude' accorded to the Board both as to remedies and as to procedure—including the holding of hearings—relating to elections and other matters." We submit that the Board was well within this "great latitude" in its determination to set aside the election without first ordering a hearing on respondent's exceptions to the Regional Director's report on objections.

2. The reasons for setting aside the election

As the Fourth Circuit said in *N.L.R.B.* v. *Shirlington Supermarket Inc.*, 224 F. 2d 649, 652, cert. denied, 350 U.S. 914, "The question before us is, not whether the action of the employer may be condemned as an unfair labor practice, but whether it furnished sufficient ground for the action of the Board in setting aside the election." This Court in *N.L.R.B.* v. *Howell Chevrolet Co.*, 204 F. 2d 79, 86, affirmed 346 U.S. 482, has similarly noted that "The processing of a representation petition, however, is a matter in which the decisions to be made relate to policies which Congress has in general committed to the discretion of the Board."

Tested by these criteria, it is plain that the Board's determination to set aside the election was a proper exercise of its discretion to determine the fairness of representation elections. For purposes of evaluating the Board's determination, the "facts" set forth in respondent's exceptions to the Regional Director's report may be accepted as true. Viewing them together with the uncontroverted facts as found by the Regional Director, the Board found that the conduct of respondent during the period between the Board's

Direction of Elections and the elections "constituted promises of and granting of benefits which were calculated to interfere with the election and formed a basis for setting it aside" (R. 63, 85).

The first objection found meritorious concerned the granting of the wage increase during the critical period. The Board found, and nothing in respondent's exceptions even purports to contradict, that on February 20, 1961,[20] respondent gave a 10-cent hourly wage increase to the employees in the voting units, advising the employees of this action in a bulletin posted conspicuously at the Company's premises the next day. Neither of the participating unions was consulted about the wage increase, nor did they acquiesce in any manner to its being granted. The increase had not previously been announced to any employees, nor was it given pursuant to any established policy of granting annual or periodic increases. Respondent's exceptions state that bargaining negotiations with the successful union at two other plants of the Company were "reaching a conclusion" early in February, and that the Company desired to maintain a standard wage rate in all plants, and also desired to be competitive with wage rates established by the competing plants in the area. Respondent neither stated in its exceptions, nor offered by way of affidavit or in any other manner, facts to support its assertion that competitive rates were such as to create a situation requiring an immediate wage increase. The picture thus presented is that of a Company which was

[20] The Board's Direction of Elections issued February 15, 1961, and the elections were conducted March 22, 1961.

just concluding its bargaining negotiations at other plants giving a wage increase to employees at a plant where elections were pending, and announcing the increase shortly after the Board directed the elections. Four days after this direction the company successfully concluded its negotiations with the Union and instituted a wage increase at its other two plants (R. 10–11). Respondent then, even though it had full knowledge that the elections would be held shortly, announced that the wage increase would apply at Heyburn as well as its other plants; just five days had elapsed between the Board's Direction of Elections at Heyburn and the granting of the increase. The Board was amply justified in these circumstances in concluding that the wage increase was "calculated to interfere with the election." Accepting as axiomatic that an employer would desire to maintain a standard wage rate in all plants, it is hard to conceive that this "desire" is automatically equated to the kind of pressing need that permits an employer to grant wage increases despite the imminence of an election. Cf. *Detroit Aluminum & Brass Corp.,* 107 NLRB 1411, 1413–1415; *Baird-Ward Printing Co., Inc.,* 108 NLRB 815, 818–819. No great, if any, hardship could have resulted here had the employer merely waited a few more weeks until the elections had been conducted before satisfying its desire to equalize the wages.

This is also, as the facts show, not the situation where normal periodic increases, customarily given, are bestowed during the pre-election period. Here too the Board has created an exception to the general rule that wage increases during the immediate pre-

election period constitute interference with the election and preclude a free choice by the employees involved. See e.g., *Sprague Electric Co. of Wis., Inc.*, 112 NLRB 165, 166; *Baird-Ward Printing Co., Inc., supra; Universal Butane Company, Inc.*, 106 NLRB 1101, 1102–1103. In short, there is nothing in the circumstances here to have warranted the Board departing from its general rule.

The propriety of the Board's conclusion with respect to the first objection is emphasized by the facts concerning the second objection.[21] The Regional Director found that between the Board's direction and the elections respondents distributed to the employees involved bulletins, correspondence, and questionnaires, all emphasizing that employees at the Heyburn plant would receive any of the benefits won by the employees at the other two unionized plants, regardless of their union affiliation. Indeed, the Company announced the wage increases at the other plants in a local newspaper, stating that because of the impending Board-election it could not put the increases into effect at Heyburn. Yet, as we have seen, respondent did put the increase into effect. Manifestly respondent was aware of its obligations, and could reasonably have deferred any action pursuant to its desire to equalize rates until after the elections were conducted. Manifestly also, the promises of benefits, taken together with the actual granting of the wage increase, constituted a reasonable basis for the Board's

[21] As noted above respondent's exceptions to the Regional Director's report do not take issue with the facts as found by the Regional Director relating to this objection.

determination to set aside the elections and conduct new ones.

In sum, the Board's determination to set aside the elections was reasonable, and was under no circumstances arbitrary or capricious so as to warrant a reversal of the Board's action within its concededly large measure of discretion in the area of representation proceedings. Nor was there any basis, in the circumstances of this case, for requiring a hearing on the objections, for respondent's exceptions to the Regional Director's report did not raise any factual questions necessitating such a hearing. It follows, accordingly, that respondent's admitted refusal to honor the certification was in violation of Section 8 (a) (5) and (1) of the Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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DECEMBER 1962.

CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9.(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit ap-

propriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board * * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.

* * * * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

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(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and shall have power to grant such temporary

relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record * * * Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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